(21)

Supreme Court of the United States

October Term, 1942

No. 596

GALBAN LOBO COMPANY, S. A.,

Petitioner,

—*v.*—

LEON HENDERSON, Price Administrator,

Respondent.

PETITIONER'S REPLY BRIEF

BAER & MARKS,
Attorneys for Petitioner.

DONALD MARKS,
JULIUS B. BAER,
Of Counsel.

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I.

Respondent asserts that the "only issue" is the determination of the date when the grounds of protest arose. The fixing of that date by the Price Administrator involved all of the collateral questions discussed in petitioner's main brief. The Administrator was not engaged in a mere factual determination, nor in the exercise of a discretionary power. He was construing and applying the law, and his action presents questions of law involving constitutional issues.

II.

Respondent rests on the view of the Court below that there was no ambiguity in the price schedule as applied to this situation and therefore there was no need for the interpretation which petitioner sought and obtained from OPA before filing its protest.

A. Before dealing with this argument, it may be profitable to go behind it. Why should it be necessary to show an ambiguity in the price schedule in order to determine that the grounds for protest arose at a date later than March 16? Even if it had been quite apparent on that date that the WSA order would affect petitioner's contract, it does not follow that the time for filing protest then began to run.

The Statute fixes a short period of 60 days after the grounds for protest arise for initiating a proceeding (Sec. 203a). Such a provision should be reasonably construed in the light of the legislative purpose. In *United States* v. *Katz,* 271 U. S. 354 at 357 this Court said: "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

There is no compelling reason here to apply an uncertain standard to determine when grounds for protest arise. The test of ambiguity used by the Court below is itself ambiguous in application. In the administration of this far reaching law, a more certain guide should be adopted so that the average man may know when he must act.

The simple and natural guide would be the date when OPA rules on an inquiry as to the impact of the law. In this case, that date was May 4. Another simple and unequivocal guide would be the date when the controversy arises through refusal of the buyer to pay the contract price. That date here was April 9.

The decision below has discarded these sure criteria for the vague and indefinable test of whether the price schedule was ambiguous in its application to the facts in question. No man can ever be sure of the answer to such a question until the courts have told him.

It could not have been the legislative purpose to cut off the

right to protest 60 days after the mere possibility of hardship appears. Yet that was all that had developed in this case on March 16. This illustrates the unsoundness of the test adopted. The time for protest should run only after the protestant knows unequivocally what the nature of his complaint is and why he must protest.

B. Beyond this, Respondent's premise that the price schedule was unambiguous is false on two main grounds:

1. If petitioner's time to file its protest began on March 16, 1942 what would have been the form and substance of such protest on that date? A protest against the order of the War Shipping Administration would not lie to the Price Administrator. A protest to the Price Administrator against the possible prospective effect of the WSA order upon FOB or FAS contracts on which petitioner had not yet made delivery would have met with the proper response, "Don't bother the OPA with hypothetical cases; wait until the actual effect of the order is felt and then apply for relief."

No reasonable man would have understood that the WSA order required him to submit a protest on each of his open contracts for determination of the effect of that order before the performance of each had reached the stage where the effect of the order had become apparent. Certainly no reasonable man would have suspected that the short period of 60 days for protest had begun to run on March 16.

The substance of a protest filed on March 16 would have been strange indeed. It would have been necessary to say, "If the buyer lifts the sugar, and if its ship charter is such that the cost of landing the sugar in New York is greater than 3.74 per pound, and if Defense Supplies Corporation will not absorb the surcharge, will the buyer nevertheless be entitled to pay the FAS contract price?" Of course other

unanticipated expenses might raise the landed cost to more than 3.74 even though the surcharge order of WSA did not have such effect. Should such possibilities be taken into consideration in a protest prepared on March 16? The question demonstrates the futility of a protest before the facts have been determined.

Obviously on March 16, the effect of the WSA order was not clear enough to warrant much less require a protest. It follows that the 60 day period of limitations should not be held to run from that date.

2. The "ambiguity" test was in any event improperly applied in this case. The Court below granted that a ruling by OPA might constitute "new grounds" for protest if the provision in question were ambiguous; but held that the ruling of May 4 was not such "new grounds" because there was no ambiguity here.

What test of ambiguity shall be applied? The Court below looked at the words of the Price Schedule and concluded that they plainly required that the contract price be reduced by the amount of the freight surcharge. Respondent (p. 5) employs the same test.

A business man, however, as of March 16 would not have regarded the matter as clear. He would see that such an application of the words of the Price Schedule would leave his contracts subject to all kinds of unknown hazards. Any increased cost of transportation would come back on the seller. FOB and FAS contracts were not prohibited by the Price Schedule. They were common trade practice. And yet they would not be effective commitments if the Price Schedule required the reduction of the FAS price by the amount of the freight surcharge.

It was not essential from the wording of the Price Schedule that such effect be given the WSA order. Outstanding con-

tracts made in reliance upon preexisting rates could be maintained. As of March 16 there was no reason for a layman to assume that such would not be the interpretation of the Price Schedule.

Even from a lawyer's point of view the same is true. Invalidation of existing contracts by the indirect effect upon the ceiling price of an order of a government agency other than OPA presents serious legal questions. It might well be expected that the Price Administrator would so construe the Price Schedule as to avoid such questions.

If, as Respondent says (pp. 5, 6), the Price Schedule "clearly required that the contract price be reduced by the amount of the freight increase", a lawyer might be excused for questioning the validity of the Price Schedule itself. An administrative agency may not thus generally nullify contract commitments made in reliance upon existing administrative rules and regulations. Due process still has some meaning, and the war does not yet justify an edict by OPA that no FAS contract for the sale of sugar is a binding obligation of the buyer if transportation costs are increased before delivery.

OPA did not fix the cost of raw sugar to the refiner's door. It could not have done so with propriety. It may not accomplish that objective by indirection.

In the light of these considerations the contention that the Price Schedule was unambiguous is fallacious. Respondent's statement that petitioner is "unable to point to any ambiguity in the price schedule" (p. 6) is without merit.

III.

Respondent argues that various factors did not justify delay in filing protest, insinuating that petitioner's case is based upon a plea to be excused for tardy filing (see pp. 6, 7 and 8).

The suggestion is unwarranted. Petitioner's argument has not sought to excuse a delay in filing the protest but to demonstrate that the grounds for protest did not arise until the OPA issued its ruling on May 4, or in any event not before the buyer refused to pay the contract price on April 9. In either case the protest was timely and there was no necessity for excuse.

IV.

Respondent's argument that the FAS clause "circumvents" the Price Schedule (p. 6) is specious. Neither the Price Administrator nor the Court below has gone so far as to claim that FAS and FOB contracts are necessarily prohibited by the terms of the Price Schedule. If such contracts were not prohibited, then any such sale at the ceiling price prevailing on the date of the contract was in conformity with the law and regulations. It begs the question to argue that because such a commitment may run counter to a later ruling it was therefore circumventive in character when made.

V.

The Price Administrator's position has been based upon a legalistic interpretation of the term "grounds" for protest. There is no call for such technicalities in the administration of the law. Yet two more technicalities are argued in Respondent's brief.

A. It is argued (p. 7) that the refusal of the buyer to pay the contract price may not be presented as new grounds for protest because such refusal was not mentioned in the protest, and therefore the protest was not "based solely on" such refusal.

Section 203 (a) does not require that the protest be based solely on grounds stated therein. The words "based solely

on" refer to the time when a protest must be filed when it is "based solely on grounds arising after the expiration of such sixty days."

Protests must state "all objections" (Procedural Regulation No. 1, Sec. 1300.29 (c)). But there is no requirement that the "sole grounds" of protest be set forth.

In this case while the protest did not specify the date of the buyer's refusal to pay the contract price, the time was clear from the facts given (Tr. 5). While petitioner urged that the grounds for protest arose on May 4 when OPA issued its ruling, it is proper and permissible to argue in the alternative that the grounds for protest in no event antedated the refusal of the buyer to pay the contract price. The sole date relied upon does not have to be stated in the protest.

B. Respondent argues that the possibility of absorption of the freight surcharge by Defense Supplies Corporation may not be considered as a factor in the picture as it appeared on March 16 because the date of the refusal of Defense Supplies Corporation to do so was not set forth in the protest and does not otherwise appear in the record (p. 8).

The protest did show that application was made to Defense Supplies Corporation for such relief (Tr. 5). The joint letter of buyer and seller to OPA dated April 22 showed that such application had been made and denied (Tr. 21, 22). The complaint in the Court below alleged the facts in paragraph 5(f) (Tr. 3); and the allegations were admitted in paragraph 2 of the answer (Tr. 9).

It is apparent that the application to Defense Supplies Corporation was made and denied before April 22; and it could not have been made earlier than the buyer's refusal to pay the contract price. This again could not have occurred until after April 4, the date when the boat sailed (Tr. 5).

These facts are therefore available in support of Petitioner's argument that as of March 16 there was no certainty that the WSA order would affect this contract and therefore no basis for protest.

VI.

The right to a hearing on the merits by an administrative tribunal should be jealously safeguarded. The ruling of May 4th by OPA is no substitute for such hearing. It cannot be assumed that after full consideration of the facts, the Price Administrator would reach the same conclusion. This Court has so held in a recent decision involving a Labor Board case. In *National Labor Relations Board* v. *Indiana & Michigan Electric Company,* decided January 18, 1943, in holding that certain evidence should have been considered which the Board deemed irrelevant, the Court said: "We will not assume in the circumstances of this case that the Board will in any event refuse to modify its conclusions."

Petitioner should not have been denied consideration of the merits of its protest. The application of the statute of limitations on the grounds given here establishes a dangerous and unwholesome precedent. It permits an administrative agency so to construe the law in its application to its own regulations as to foreclose the vigilant as well as the unwary from a hearing on the merits, even though the normal course of inquiry has been followed.

This is neither the appropriate nor the sensible approach to problems of statutory construction and administration of the law. In the name of equity and sound government the writ of certiorari should be granted to review the judgment of the Court below.

Dated: New York, N. Y.,
January 25, 1943.

Respectfully submitted,

BAER and MARKS,
Attorneys for Petitioner,
by
DONALD MARKS.

DONALD MARKS,
JULIUS B. BAER,
Of Counsel.